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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 1959 160

THOMAS HENRY HUNSAKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JOURNAL OF COMMERCE

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In the Supreme Court of the United States

October Term, 1959

THOMAS HENRY HUNSAKER,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Thomas Henry Hunsaker, Petitioner, prays that a write of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 23rd, 1960.

CITATION TO OPINION BELOW

The opinion and judgment of the Court of Appeals are unreported and are printed in Appendix A hereto, infra, p. 14-23.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23rd, 1960. Jurisdiction of this Court is invoked under U.S.C., Title 28, Section 1254(1).

QUESTIONS PRESENTED

1. Is the Gold Reserve Act of 1934 constitutional?

2. Are the Gold Regulations constitutional?

3. Does the indictment plead facts sufficient to constitute a crime?

4. Did the trial court err in refusing to grant petitioner's motion for directed verdict?

5. Is there any statutory authority for the judgment entered by the trial court?

6. Is the judgment entered by the trial court herein valid?

7. Did the trial court err in its instructions to the jury?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment. Printed in Appendix B.

Constitution, Article I, Sec. 1. Printed in Appendix B.

U.S.C. Title 31, Section 442, 48 Stat. 340. Printed in Appendix B.

U.S.C. Title 31, Section 443, 48 Stat. 340. Printed in Appendix B.

Gold Regulations, 31 C.F.R., Part 54; 19 F.R. 4309-4316.

Conspiracy statute, U.S.C., Title 18, Section 371, 62 Stat. 701. Printed in Appendix B.

U.S.C. Title 18, Section 1. Printed in Appendix B.

STATEMENT

Petitioner was convicted of conspiracy to violate the Gold Reserve Act of 1943 (Title 31, Secs. 440 et seq., United States Code), and to defraud the government by possessing gold bullion without a license claimed to be required by the Gold Regulations. (31 C.F.R. Part 54, 19 F.R. 4309-4316.) The indictment was drawn under the conspiracy statute, Title 18, Section 371, United States Code, and is printed herein as Appendix C, infra. Petitioner was sentenced by the trial court to serve 18 months in the federal penitentiary, whereupon an appeal was perfected to the Court of Appeals. That Court affirmed.

On May 2, 1958, at the Benson Hotel, Portland, Oregon, petitioner and Glen Earl Adkisson, since deceased,

were arrested by secret service agents for being in possession of 24 bars of gold bullion, aggregating 577.085 ounces of fine gold. The gold was confiscated by the government. On February 4th, 1939, defendants were jointly indicted and on June 29th, 1939, they were tried before a jury which returned verdicts of guilty as to both defendants. At the close of the evidence, defendants moved for a directed verdict on constitutional grounds and on the further ground that the indictment failed to state facts sufficient to constitute an offense against the United States. Pursuant to order of the Court of Appeals, a partial transcript including the motion and the trial court's ruling thereon was included in appellant's brief as an appendix and are printed as Appendix D herein. In addition, defendants made objections to the court's instructions to the jury, to which exceptions were allowed. The challenged instructions and exceptions made thereto are printed as Appendix E, infra. They also appear in the transcript of record below, pages 16 and 30-32.

REASONS FOR GRANTING THE WRIT

1. The trial court erred in refusing to allow petitioner's motion for directed verdict (Appendix D, supra. P. 30, because there is no constitutional authority for the government to prohibit the possession of gold by a private citizen. Constitution of the United States.

The government of the United States is acknowledged to be one of enumerated powers. *McCulloch v. Maryland*, 4 Wheat. 316, 405. It has been consistently recognized that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect those enumerated powers. *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304. Therefore, if nothing is found in the Constitution granting to Congress the power to prohibit the possession of gold by a private citizen, then the Gold Reserve Act and the regulations promulgated thereunder are void, and hence, there can be no conspiracy to violate such Act or regulations.

Under the Gold Reserve Act, U.S.C. Title 31, Section 442, Appendix B herein, the Secretary of the Treasury attempted to prohibit the possession of gold bullion by a private citizen without a license issued by him. (Gold Regulations 31 C.F.R. Part 54.)

Gold is property and is the subject of private ownership in various forms such as jewelry and dentistry. The private ownership of property is a common law right not dependent upon constitutions for its existence, but to insure its continuance it is guaranteed by the federal and the various state constitutions. *Terrace v. Thompson*, 263 U.S. 197, 5th Amendment, Constitution

of the United States. Gold is not a deleterious substance and therefore is not subject to the rules governing the regulation of opium or other harmful substances. *Mugler v. Kansas*, 123 U.S. 623. The general rule is that property rights shall be free of arbitrary governmental interference. *Breard v. Alexandria*, 341 U.S. 622. Accordingly, an owner of property cannot be deprived of his property or the use thereof without due process of law. *Los Angeles v. RR Commission*, 29F(2) 140, aff'd. 280 U.S. 145; 5th Amendment, Constitution of the United States. There is nothing in the Constitution which grants to Congress the power to prohibit the private ownership or possession of gold bullion, and therefore the judgment in the case at bar is invalid. Constitution of the United States.

In *Laycock v. Kenney*, 270 F(2) 580 (1959), the 9th Circuit held that the Gold Reserve Act of 1934 and the Gold Regulations promulgated thereunder were constitutional insofar as the setting of price for newly mined gold to a property owner was concerned. This Court refused to review, 361 U.S. 933 (1960). However, the 6th Circuit has also held that an indictment drawn under an emergency executive order prohibiting the possession of gold is invalid if there had been an expiration of the emergency giving rise to the order. *Bauer v. United States*, 244 F(2) 794 (1957). The Bauer de-

cision was neither cited nor discussed by the lower court in the subject case, although called to the court's attention.

2. The trial court erred in refusing to allow petitioner's motion for directed verdict because the Gold Regulations constitute unlawful legislation upon the part of the Executive Department insofar as they attempt to prohibit the possession of gold by a private citizen without a license. Constitution of the United States.

Art. I, Sec. 1, Constitution of the United States, provides that "All legislative powers herein granted shall be vested in a Congress of the United States. * * *" Something as drastic as prohibiting the possession of non-deleterious property, the protection of which is sacred in this country, is legislation which Congress is charged with the responsibility of enacting. Congress cannot delegate this responsibility to the executive branch of the government. *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Schechter Poultry Corp. v. United States*, 295 U.S. 495. The Gold Reserve Act does not contain any prohibition of gold ownership or possession. Rather, this appears in the Gold Regulations prepared by one man, the Secretary of the Treasury. This is in violation of the separation of powers concept of the Constitution.

3. The indictment fails to state facts sufficient to constitute an offense against the United States.

The indictment in this case, Appendix C, infra, is based upon the conspiracy statute, Title 18, United States Code, Section 371. (Appendix B)

While it is true that in *Haas v. Henkel*, 216 U.S. 462, the court extended the words of the statute beyond any pecuniary loss of the United States, nevertheless, to state an offense where no pecuniary loss is involved, it is necessary to allege an obstruction of lawful governmental operations by deceit, craft or trickery or by means that are dishonest. *Hammerschmidt v. U.S.*, 265 U.S. 182, 188; *Berenheim v. U.S.*, 164 F(2) 679, 683; *Heald v. U.S.*, 175 F(2) 878, 880. This was not done in the indictment under consideration and therefore, it is fatally defective. Open defiance of the government's purpose to enforce a law or open violation of that law is not deceit, craft or trickery. (See Hammerschmidt opinion at p. 189.) In the case at bar, there was no pecuniary loss to the government, there was no injury to the public as there was in *Haas v. Henkel*, and the indictment denies any deceit, craft or trickery by alleging the overt acts which it is claimed constitute a violation of the law. *Hammerschmidt vs. U.S.* is controlling herein, and it was not followed by the lower court.

4. The judgment entered by the trial court is invalid because of the sentence imposed.

The Conspiracy Statute, U.S.C., Title 18, Section 371, Appendix B, provides that if the object of the conspiracy is a misdemeanor, the punishment provided for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. U.S.C., Title 18, Section 1, defines the offense under consideration as a misdemeanor at most. The Gold Reserve Act, U.S.C. Title 31, Section 443, provides that gold held in violation of the Act or regulations shall be forfeited to the United States and the guilty person shall be subject to a penalty equal to twice the value of the gold.

Under the foregoing sections of the code, the most that we have involved in this case is a misdemeanor, and by definition it is a petty offense. The Conspiracy Statute itself limits the punishment for a conspiracy to commit an offense which is a misdemeanor to the maximum punishment provided for such misdemeanor. The Gold Reserve Act provides only for forfeiture and fine by way of penalties. *Bauer v. United States* holds that "this is the full limit of the penalties which can be imposed under existing law." (9th Circ.), 244 F. 2) 794, 796.

While it is true that violations of valid administrative regulations may be punished as crimes (*United*

States v. Grimaud, 220 U.S. 506), nevertheless the penalties must be provided in the statute itself. Additional punishment cannot be imposed by administrative action. (*Stewart & Bros., Inc., v. Bowles*, 322 U.S. 398, 404).

In the case at bar, the trial court did not have the authority to impose sentence of imprisonment and therefore the judgment herein is invalid. The case at bar is distinguished from *United States v. Hutto*, 256 U.S. 524 in that the Gold Reserve Act does not make the possession and sale of gold bullion unlawful. This is attempted to be done by the Gold Regulations. Therefore, the policy and prohibitions are set down by one man and not by Congress. Further, the possession of gold by petitioner could not disrupt or interfere with any governmental function. Nor could it cause the government any harm as was done in *Haas v. Henkel*, 216 U.S. 462, where the value of cotton crop reports were destroyed; *Hammerschmidt v. U.S.*, 265 U.S. 182, where persons were dissuaded from registering for military service; and *U.S. v. Waldin*, 149 F. Supp. 912, (D.C., E.D. Pa., 1957), where a government official was corrupted by an attempt to fix a criminal income tax case. A man should not be sent to prison on the present record with judicial comment that incongruities should be left to Congress. (See p. 3, opinion, 9th Circ., Appendix A).

5. The trial court erred in its instructions to the jury. During the course of the court's instructions to the jury the remark was made "• • • you may find that these people might be guilty also • • •" (Tr. 16) The court was quick to recognize the error as is apparent from the following colloquy between the court and defendant's counsel:

"The Court: I will change that right now. I did not mean that. It was just a slip of the tongue.

"Mr. Easley: I realize that.

"The Court: I am going to change that."

Thereafter the court told the jury in part that:

"• • • even if I should believe that one witness was not telling the truth or one of the defendants or both of them were guilty, you would be at liberty to disregard anything I said or any looks of mine • • • I did not intend to tell you how I would decide this case because in past cases sometimes I tell you afterwards what I would have done, but I do not tell you before • • •" (Appendix E, supra, P. 33)

It was obvious to the court and it was obvious to the jury that the impression was given that the court's mind was made up as to the guilt of the defendant, and this was highly prejudicial to defendant's case. The court

is in a position of great influence with the jury and when he says something that implies guilt, the jury is going to follow the lead of the court. In *Snyder v. Mass.*, 291 U.S. 97, 118, defendant was being prosecuted for murder. At a jury view of the scene—a filling station—the trial court commented that "one of the three pumps was not there at the homicide." This was criticized by the supreme court as being a prejudicial remark because it assumed that there had been a homicide. However, since there was no objection made and since the presence or absence of the third pump had no bearing on the issues of the case, the error was held harmless. In the case at bar, however, there was an objection when the court assumed in his remarks that defendant was guilty and his remarks couldn't help but have had influence with the jury. The court itself was quick to recognize this whereupon he made it worse by his further remarks. It put appellant at an insurmountable disadvantage for the court to tell the jury that someoneelse may be guilty also. It was a direct assumption that the court had determined guilt. In the eyes of the jury this was obviously important and they acted accordingly. *Quercia v. United States*, 289 U.S. 466, 470.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NORMAN L. EASLEY,
Counsel for Petitioner.

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS HENRY HUNSAKER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 16,596
May 23, 1960

Appeal from the United States District Court for the District of Oregon

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Before: MAGRUDER, HAMLEY and KOELSCH, Circuit Judges.

MAGRUDER, Circuit Judge.

This appeal is from a judgment of the United States District Court for the District of Oregon imposing upon appellant a prison sentence of 18 months, entered after trial upon a verdict of guilty rendered by the jury.

On February 4, 1959, the grand jury returned an indictment against Thomas Henry Hunsaker and Glen Earl Adkisson, since deceased, charging a criminal conspiracy, in violation of 18 U.S.C. § 371, to commit offenses against the United States, that is to say, to

violate 31 U.S.C. §§ 440-443 and the regulations, commonly known as the "Gold Regulations," issued and promulgated thereunder. The indictment also charged a criminal conspiracy "to defraud the United States in the exercise of its governmental functions . . . in that defendants, without a license duly issued, did acquire, hold, transport and offer to sell and dispose of, at any one time, fine gold in quantities in excess of that permitted by said regulations." The indictment charged the performance of three "overt acts" in pursuance of said conspiracy.

18 U.S.C. § 371, under which defendants were indicted, provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

It will be noted that two separate types of conspiracy are denounced, a conspiracy "either to commit any offense against the United States, or to defraud the

United States." This language has for a long time been on the books. See Rev. Stat. § 5440 (1875). *United States v. Hutto*, 256 U.S. 524 (1921), decided that the government could establish a conspiracy to commit an "offense against the United States" without showing a conspiracy to commit any offense made punishable by a criminal prosecution, provided the conspiracy was to commit any offense which by act of Congress is prohibited in the interest of the public policy of the United States but is made punishable only by a civil suit for a statutory penalty. In *Haas v. Henkel*, 216 U.S. 462, 479 (1910), referring to a conspiracy "to defraud the United States," the Court held that the statutory language was broad enough "to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." It is true these two cases were decided under an earlier version of the statute, but we have no doubt that they are fully applicable today.

As appears from the above quotation, the Congress provided the penalty for a criminal conspiracy as being a fine of not more than $10,000 or imprisonment for not more than five years, or both. However, the Congress was impressed with the injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor only; and hence it wrote in the

exception contained in the second paragraph of §371, providing that if the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." Thus, the only exception to be found in the statute relates to a case where the conspiracy is to commit a substantive misdemeanor. The exception is not applicable where, as here, the substantive "offense against the United States" was not a misdemeanor but was enforceable only where the one remedy given was a suit for a civil penalty. Since the penalty imposed in the judgment under review is well within the limit of the penalty for a criminal conspiracy which the Congress has prescribed in the first paragraph of §371, it is obvious that the judgment is not unlawful on that account. Whatever incongruity there may be in imposing a greater penalty for a conspiracy to commit an offense against the United States which is neither a felony nor a misdemeanor than would be the penalty had the offense against the United States been a misdemeanor only, is a matter for the Congress to consider. The language it used admits of no debate. See *United States v. Wiesner*, 216 F.2d 739 (2d Cir. 1954).

Appellant's main contention is that the Gold Reserve Act of 1934 is unconstitutional. This contention was

exhaustively considered by us in the recent case of *Laycock v. Kenney*, 270 F.2d 580 (9th Cir. 1959), cert. denied 361 U.S. 933 (1960), where we upheld the constitutional validity of the underlying statute and of the gold regulations issued pursuant thereto. We are not disposed to examine into this question again.

Appellant also makes the contention, obviously a case of grasping at straws, to the effect that the trial court committed prejudicial error in his instructions to the jury in that he implied that the defendants were guilty. It appears that in the course of the charge to the jury, which was generally fair to the defendants, and in which the trial judge carefully explained to the jury that they were the exclusive judges of the facts in the case and of the credibility of all the witnesses, he had occasion to tell the jury that they were not to be disturbed by the fact that they might believe some other persons, not charged in the indictment, to be "also" guilty; that all that the jury had to concern themselves with was that guilt was proven beyond a reasonable doubt as to the named defendants. In this connection the trial judge charged:

> "You are not called upon to return a verdict as to the innocence or guilt of any other person or persons, so if the evidence convinces you beyond a reasonable doubt of the guilt of the defendants, or any of them, you should so find, even if you believe one or more other persons also are guilty. You will recall

that there was some testimony that the Biles likewise were the ones who melted down this gold in the presence of one of the defendants here. Now you may find that these people might be guilty also, but they are not before us, and there is nothing that you can do to find them guilty. Your sole inquiry should be: Did the evidence in this case prove beyond a reasonable doubt that one or both of these defendants,—that is, Hunsaker or Adkisson,—are guilty?"

When counsel were called to the judge's chambers at the conclusion of the charge, the only exception which counsel for the defendants took thereto was the above statement which counsel asserted "left the impression upon me that you were assuming inadvertently that these defendants were guilty." In the colloquy that followed, the court said it was merely a slip of the tongue which he was going to correct. Thereupon the trial judge gave this further instruction to the jury:

"My attention has been called to the fact that I may have made a slip of the tongue. I want to correct it, if I did.

You will recall that I was talking about the fact that the only people on trial are Hunsaker and Adkisson. You do not have to worry about anybody else. Now it is said that in discussing that I talked about two people, Biles, and likewise I said you may also find them guilty, the implication being that I might have inferred to you that I have come to the conclusion that Hunsaker and Adkisson are guilty by that statement. If anybody got that idea, which I

> do not believe anybody did, but if they did I did not mean it that way. This is a good time to tell you again what I have told you many times. I am going to tell you what the law is; you tell me what the facts are, and you apply the facts to the law, and even if I should believe that one witness was not telling the truth or one of the defendants or both of them were guilty, you would be at liberty to disregard anything I said or any looks of mine because under the law you are the sole and exclusive judges of the facts and the credibility of all witnesses. I did not intend to tell you how I would decide this case because in past cases sometimes I tell you afterwards what I would have done, but I do not tell you before, and I did not intend to do it now."

Counsel for the defendants were still not satisfied with the foregoing correction and saved an exception to the charge. It does not appear from the transcript of the record before us that counsel for the defendants ever moved for a mistrial on account of an irremediable error committed by the trial judge, and it is clear that the explanation of the incident, which the trial judge promptly gave to the jury, was eminently satisfactory.

Appellant relies particularly upon the decision of the Supreme Court in *Hammerschmidt v. United States*, 265 U.S. 182 (1924). In that case the charge of conspiracy was solely that appellants had conspired "to defraud the United States" by impairing, obstructing and defeating a lawful function of its government, to wit, that of registering for military service all male

persons between the ages of twenty-one and thirty through the printing, publishing and circulating of handbills and other printed matter intended and designed to counsel, advise and procure persons subject to the draft to refuse to obey it. The Supreme Court held that the trial judge committed error in overruling a demurrer to the indictment; that the demurrer should have been sustained and the indictment quashed. The Court pointed out that to conspire "to defraud the United States" meant primarily to cheat the government out of property or money, but also it meant to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. The indictment here followed the terms of the statute. We shall assume that so much of the indictment was defective as related to a conspiracy "to defraud the United States" in its failure to allege deceit, craft or trickery, or at least by means that are dishonest (but see *United States v. Barrios*, 124 F. Supp. 807 (S.D.N.Y. 1952), aff'd 216 F.2d 739 (2d Cir. 1954)). But it does not appear from the record that appellants asked the trial judge to quash the indictment or any part thereof or to dismiss the same for the reasons stated. The case went to trial, and in the course of his charge to the jury the judge said that to conspire to defraud the United States

"means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. Therefore, in order to find the defendants guilty of the charges in the indictment, you must find that they were guilty of a conspiracy and that an object of the conspiracy was to obstruct one of the Government's lawful functions by dishonest means."

Counsel for the defendants took no exception to this portion of the charge. The trial judge committed no error in denying defendants' motion for a directed verdict on the ground that the indictment failed to state facts sufficient to sustain the charge that the defendants conspired to defraud the United States. Certainly, so far as the indictment charged a conspiracy to commit an offense against the United States, it was unexceptionable.

A judgment will be entered affirming the judgment of the District Court.

(Endorsed) Opinion Filed May 23, 1960.

Frank H. Schmid, Clerk.

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: May 23, 1960

FRANK H. SCHMID, Clerk

APPENDIX B

Relevant Portion of the Fifth Amendment and of Article I, Section 1 of the Constitution.

Fifth Amendment—Nor shall any person be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I, Section 1—All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Statutes Involved.

(31 U. S. C. 442), 48 Stat. 340

"The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of this act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in

custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of the section, in whole or in part, gold situated in places beyond the limits of the continental United States. Jan. 30, 1934."

(31 U. S. C. 443)

"Any gold . . . held . . . in violation of (the Act or regulations) . . shall be forfeited to the United States, . . . and in addition any person failing to comply with the provisions of said sections or of any such regulations . . . shall be subject to a penalty equal to twice the value of the gold . . ."

(18 U. S. C. 371)

"Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

(18 U. S. C. 1)

"Offenses classified

"Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony."

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

APPENDIX C

In the United States District Court
For the District of Oregon

No. C-18709

UNITED STATES OF AMERICA

vs.

THOMAS HENRY HUNSAKER and GLEN EARL ADKISSON, Defendants.

INDICTMENT

18 USC § 371

The Grand Jury Charges:

That commencing on or about January 27, 1958 and continuously thereafter up to and including May 2, 1958, at Portland, within the District of Oregon, Thomas Henry Hunsaker and Glen Earl Adkisson, defendants, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other and with diverse other persons whose names are to the grand jury unknown, to commit offenses against the United States, to wit: to violate Title 31, Sections 440, 441, 442 and 443 of the United States Code and the regulations (commonly known as the "Gold Regulations") issued and promulgated thereunder, and to defraud the United States in the exercise of its governmental functions of regulating the value of money, stabilizing the exchange value of the dollar and regulating

and controlling the acquisition, holding, holding in custody, transporting, melting and treating, importing, exporting, or earmarking and disposing of fine gold for industrial, professional and artistic use, and for other purposes; in that defendants, without a license duly issued, would acquire, hold, transport and offer to sell and dispose of, at any one time, fine gold in quantities in excess of that permitted by said regulations.

It was further a part of said conspiracy that after defendants would acquire fine gold in quantities, at any one time, in excess of that permitted by said regulations, they would not use or cause to be used said fine gold so acquired for the uses and purposes permitted by said statutes and regulations, but would divert and offer to sell and dispose of, and would undertake to dispose of the same, without holding a license from the Director of the United States Mint or the United States Assay Office in the Mint District at San Francisco, California, authorizing either of the defendants so to do.

Overt Acts

1. In pursuance of said conspiracy, and to effect the objects thereof, in the District of Oregon, on or about May 2, 1958, at Portland, Oregon, the defendant Thomas Henry Hunsaker transported and brought into the Benson Hotel, 309 Southwest Broadway, Portland, Oregon, a quantity of fine gold in excess of that permitted by said regulations.

2. In pursuance of said conspiracy, and to effect the objects thereof, in the District of Oregon, on or about May 2, 1958, at the Benson Hotel, 309 Southwest Broadway, Portland, Oregon, the defendants Thomas Henry Hunsaker and Glen Earl Adkisson had in their joint possession a quantity of fine gold of approximately 577.085 troy ounces.

3. In pursuance of said conspiracy, and to effect the objects thereof, in the District of Oregon, on or about May 2, 1958, at the Benson Hotel, 309 Southwest Broadway, Portland, Oregon, the defendants Thomas Henry Hunsaker and Glen Earl Adkisson submitted to Clarke W. Hunter and Robert R. Turner, for inspection, 24 bars of fine gold, aggregating approximately 577.085 troy ounces.

In Violation of Section 371 of Title 18, United States Code.

Dated this 4th day of February, 1959.

A True Bill.

/s/ S. J. ROGERS,
Foreman.

C. E. LUCKEY,
United States Attorney,
District of Oregon.

/s/ GEORGE E. JUBA,
Assistant U. S. Attorney.

APPENDIX "D"

TRANSCRIPT OF PROCEEDINGS in re:

Defendants' Motion for Directed Verdict

(The following proceedings were had in the Court's Chambers, both defendants being present:)

MR. EASLEY: Both parties having rested their case, the defendants respectfully move the Court for a directed verdict of acquittal on the following grounds:

One: There is no constitutional authority for the Gold Reserve Act, the only place in the Constitution which might have some bearing being Article 1, Section 8, that Congress shall have power to coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures. There is no money involved here, and the law in itself is unconstitutional for the reason that there is no constitutional authority for the law.

On the further ground that the Indictment does not state facts sufficient to constitute an offense against the United States or to sustain the charge that the defendants conspired to defraud the United States or any agency thereof. The defendants contend that this prosecution is taking liberty without due process of law and that the Fifth Amendment is being violated. It substantially interferes with the liberty of the defendants'

freedom of contract right to own and make use of private property.

On the further ground that Congress does not have the authority to delegate legislation to the Executive, and when they did, pursuant to a Gold Reserve Act by and through the Gold Regulations, that there was a violation of Article 1, Section 1, of the Constitution, unlawful delegation of legislative powers.

On the further ground that the regulations constitute unauthorized legislation by the Executive Department.

I call your Honor's attention to the further ground that we are charged with selling fine gold, and the proof is to gold that is not fine, the testimony being that it is unrefined gold, and, therefore, there is failure of proof.

On those grounds and for those reasons, we make this motion, your Honor.

THE COURT: The motions are denied.

APPENDIX E

"• • • You are not called upon to return a verdict as to the innocence or guilt of any other person or persons, so if the evidence convinces you beyond a reasonable doubt of the guilt of the defendants, or any of them, you should so find, even if you believe one or more other persons also are guilty. You will recall that there was some testimony that the Biles likewise were the ones who melted down this gold in the presence of one of the defendants here. Now you may find that these people might be guilty also, but they are not before us, and there is nothing that you can do to find them guilty. • • •" (Tr. 16)

• • • • • •

"The Court: Have you any exceptions?

"Mr. Juba: No exception; nothing.

"Mr. Easley: One exception. There is an instruction in there to the effect that, 'You may find Biles likewise guilty also,' which left the impression upon me that you were assuming inadvertently that these defendant were guilty.

"The Court: I will change that right now. I did not mean that. It was just a slip of the tongue.

"Mr. Easley: I realize that.

"The Court: I am going to change that.

"Mr. Easley: That is the extent of the exceptions." (Tr. 30-31)

* * * * * *

"* * * I am going to tell you what the law is; you tell me what the facts are, and you apply the facts to the law, and even if I should believe that one witness was not telling the truth or one of the defendants or both of them were guilty, you would be at liberty to disregard anything I said or any looks of mine because under the law you are the sole and exclusive judges of the facts and the credibility of all witnesses. I did not intend to tell you how I would decide this case because in past cases sometimes I tell you afterwards what I would have done, but I do not tell you before, and I did not intend to do it now.

"Will you swear the Bailiff.

(Bailiff sworn and jury retires for deliberations.)

"The Court: Mr. Easley, do you have any objections to the remarks that I made?

"Mr. Easley: Yes, your Honor. In endeavoring to clarify the remarks, I believe that you said that 'Even though I may think that a witness is not telling the truth or one of the other defendants is guilty, you are to

entirely disregard that.' Then, 'I may talk to you about it later, but it is not my duty now to discuss it with you,' words to that effect, and I think our impression was, or at least it is to me, that you had come to the conclusion that these people are guilty. I know you do not intend that, but then the record will speak for itself.

"The Court: Mr. Easley, I know you can spin fine theories, but this is the finest I have ever seen. I think I made that abundantly clear. Once in a while I tell a jury that I think they arrived at a correct verdict. I never tell them I didn't think that they arrived at a correct verdict.

"Mr. Easley: May I have an exception, your Honor?

"The Court: Yes." (Tr. 31-32)

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JAMES R. BROWNING, Clerk

No. 160

In the Supreme Court of the United States

OCTOBER TERM, 1960

THOMAS HENRY HUNSAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 14-22; R. 37-42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1960 (Pet. App. 22-23; R. 43). The petition for a writ of certiorari was filed on June 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Gold Reserve Act of 1934 and the regulations promulgated thereunder, providing a li-

censing system for the conditions under which gold may be held and exported, are constitutional.

2. Whether the indictment sufficiently charged a conspiracy to defraud the United States in the exercise of a governmental function.

3. Whether the indictment supports the sentence of eighteen months.

4. Whether the charge to the jury erroneously implied that the court had already decided that petitioner was guilty.

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. 440-443 provide as follows:

§ 440. Short title.

The short title of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12 shall be the "Gold Reserve Act of 1934."

§ 441. Title to gold coin and bullion transferred to United States; payment therefor.

On January 30, 1934, all right, title, and interest, and every claim of the Board of Governors of the Federal Reserve System, of every Federal Reserve bank, and of every Federal Reserve agent, in and to any and all gold coin and gold bullion shall pass to and are vested in the United States; and in payment therefor credits in equivalent amounts in dollars are hereby established in the Treasury in the accounts authorized under section 467 of Title 12. Balances in such accounts shall be payable in gold certificates, which shall be in such form and in such denominations as the Secretary of the Treasury may determine. All gold

so transferred, not in the possession of the United States, shall be held in custody for the United States and delivered upon the order of the Secretary of the Treasury; and the Board of Governors of the Federal Reserve System, the Federal Reserve banks, and the Federal Reserve agents shall give such instructions and shall take such action as may be necessary to assure that such gold shall be so held and delivered.

§ 442. Regulations for the acquisition and use of gold; exemption of gold held beyond continental United States.

The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States.

§ 443. Acquisition and use of gold in violation of law; penalties.

Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12 or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of said sections or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not

exceed the maximum punishment provided for such misdemeanor.

31 C.F.R. 54.12 provides:

Conditions under which gold may be acquired, held, melted, etc. Gold in any form may be acquired, held, transported, melted or treated, imported, exported, or earmarked only to the extent permitted by and subject to the conditions prescribed in the regulations in this part or licenses issued thereunder.

31 C.F.R. 54.22 provides:

Licenses required. Except as permitted in §§ 54.12 to 54.20, inclusive, and § 54.21, gold may be acquired and held, transported, melted or treated, imported, exported or earmarked for industrial, professional or artistic use only to the extent permitted by licenses issued under § 54.25.

STATEMENT

Petitioner and one Adkisson, since deceased, were charged in a one-count indictment returned in the United States District Court for the District of Oregon with conspiracy (1) to commit offenses against the United States in violation of 31 U.S.C. 440 through 443 and the regulations promulgated thereunder; and (2) to defraud the United States in the exercise of its governmental functions relating to monetary policies. The indictment charged "that defendants, without a license duly issued, would acquire, hold, transport and offer to sell and dispose of, at any one time, fine gold in quantities in excess of that permitted by" the regulations and, instead of using it for purposes permitted by the statutes and regulations, would offer and undertake to sell and dispose of it without holding the required license (R. 3-4). The three overt acts alleged

were that on May 2, 1958, the defendants transported, had in their joint possession, and submitted to others for inspection a quantity of fine gold in excess of that permitted by the regulations (R. 4-5).

The jury found petitioner guilty as charged (R. 8) and the court sentenced him to imprisonment for eighteen months (R. 8-9). On appeal (R. 10), the conviction was affirmed (R. 37-43).

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 4-7) that the relevant provisions in 31 U.S.C. 440-443 of the Gold Reserve Act of 1934 and the gold regulations promulgated thereunder are unconstitutional. The Gold Reserve Act, enacted to control the value of gold in stabilizing the national monetary system, is supported by the broad constitutional authority of the federal government with relation to the monetary system. As this Court said in the leading Gold Clause cases, *Norman* v. *Baltimore & Ohio*

See also the carefully considered opinions in *Lagocz v. Kenny*, 270 F. 2d 580, 580-582 (C.A. 2), certiorari denied, 361 U.S. 933, and *Uebersee Finanz-Korporation v. Rosen*, 83 F. 2d 225, 229-230 (C.A. 2), certiorari denied, 298 U.S. 679.

Nor do the regulations involve an unconstitutional delegation of legislative powers to the Secretary of the Treasury. Congress, not the Treasury, proscribed the acquisition and use of gold subject only to the power of the Treasury to grant exceptions by regulation. In permitting the Secretary to grant exceptions for the purposes set forth in (a), (b), and (c) of 31 U.S.C. 442 (*supra*, p. 3), Congress established sufficient standards and effected a lawful delegation of power. *Uebersee Finanz-Korporation v. Rosen*, *supra*, 83 F. 2d at 230; *Lagocz v. Kenny*, *supra*, 270 F. 2d at 582.

2. The indictment charged conjunctively conspiracy (1) to commit offenses against the United States in violation of 31 U.S.C. 440-443 and the gold regulations; and (2) to defraud the United States in the exercise of its governmental functions relating to monetary policies by holding and offering to dispose of gold without a license in quantities in excess of those permitted by the regulations (R. 3-4). Petitioner attacks (Pet. 8) that part of the indictment which charged conspiracy to defraud the United States in the exercise of its governmental function, arguing that under *Hammerschmidt v. United States*, 265 U.S. 182, 188, the omission of an allegation that obstruction of the governmental function was by "deceit, craft or trickery, or at least by means that are dishonest," was fatal. But *Hammerschmidt* held only that the word "defraud" as used in the conspiracy statute requires proof of dishonest means, and hence that an indictment

which charged, not dishonesty but open defiance, was insufficient to state an offense. It does not follow, however, that an indictment which charges a scheme to defraud must spell out in detail the dishonesty or trickery involved, since the Court stated that "to defraud" itself refers to "trick, deceit, chicane or overreaching." *Id.* at 188. Here the allegations of the indictment, that there was a conspiracy *to defraud* the United States by obtaining and disposing of gold without the required license, adequately charged a scheme to acquire and dispose of gold by dishonest means. And, unlike *Hammerschmidt*, the specific allegations were fully consistent with the general charge of fraud—that is, trickery and dishonesty—required by the statute.[1]

In any event—even if contrary to our contentions the indictment was loosely or poorly drawn—petitioner was adequately informed of the charge against him. Since no prejudice has been shown, the indictment is not vulnerable to attack after verdict on an issue of pleading raised for the first time on appeal. *Hagner v. United States*, 285 U.S. 427, 433.

3. Petitioner argues (Pet. 9-10) that, since violations of the Gold Reserve Act of 1934 are made punishable by civil penalties[2] and not criminally, he could be punished only under the second paragraph of the conspiracy statute, 18 U.S.C., 371 *supra*, p. 11, as for a conspiracy to commit a misdemeanor, and that the eighteen-month sentence is therefore excessive. But both conspiracies charged in the indictment—to commit offenses against the United States in violation of 31

[1] At the trial, the court's charge defined a conspiracy to defraud the United States as meaning "* * * to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest" (R. 24).

[2] See 31 U.S.C. 443 *supra*, p. 10 (providing for the forfeiture of illegally held gold and a penalty for twice its value to be sued for by the United States, but making no provision for imprisonment).

U.S.C. 440-443 and to defraud the United States—come within paragraph one of 18 U.S.C. 371 and are therefore specifically punishable by imprisonment for up to five years. Paragraph one of 18 U.S.C. 371 includes conspiracies "to commit *any* offense against the United States" with the exception of conspiracy to commit a misdemeanor, which is covered by the second paragraph (emphasis added). Violation of the Gold Reserve Act (31 U.S.C. 440-443) is an offense punishable only by civil penalties and is not a misdemeanor. Thus, the clear language of 18 U.S.C. 371 establishes that such a violation does not come within the exception but rather within the general rule stated in paragraph one. While as Judge Magruder stated for the court below it is perhaps an "incongruity" to impose a greater penalty for conspiracy to commit an offense punishable only by civil penalties than for conspiracy to commit a misdemeanor, this "is a matter for Congress to consider" (Pet. 17). See the detailed discussion of this issue below (Pet. 15-17) and in *United States* v. *Wiesner*, 216 F. 2d 739, 741-742 (C.A. 2) (also dealing with conspiracy to violate the gold regulations). Similarly, since, as shown above, the indictment sufficiently charged a conspiracy "to defraud the United States," the first paragraph of 18 U.S.C. 371 is explicitly applicable.

4. Petitioner contends (Pet. 11-12) that the court erred in its instructions by leaving the jury with the impression that the court had already made up its mind that petitioner was guilty.

As part of its final charge the court stated that the jury had to pass upon the guilt or innocence of each defendant separately and then continued (R. 16):

> You are not called upon to return a verdict as to the innocence or guilt of any other person or persons, so if the evidence convinces you beyond a

reasonable doubt of the guilt of the defendants, or any of them, you should so find, even if you believe one or more other persons also are guilty. You will recall that there was some testimony that the Biles likewise were the ones who melted down this gold in the presence of one of the defendants here. Now you may find that these people might be guilty also, but they are not before us, and there is nothing that you can do to find them guilty. Your sole inquiry should be: Did the evidence in this case prove beyond a reasonable doubt that one or both of these defendants, that is, Hansaker or Adkisson,—are guilty? Then if it did prove that, then you would find them guilty. If the evidence fails to prove that they are guilty beyond a reasonable doubt and a moral certainty, then you should find them not guilty.

When asked for exceptions to the charge in the judge's chambers, petitioner's counsel objected that the statement about the possibility of also finding the Biles guilty, left the jury with the impression that the court was inadvertently assuming that the defendants were guilty. The court remarked that this was a slip of the tongue and that he was going to remedy it (R. 30-31). The court then recalled the jury and gave these further instructions (R. 31-32):

My attention has been called to the fact that I may have made a slip of the tongue. I want to correct it, if I did.

You will recall that I was talking about the fact that the only people on trial are Hansaker and Adkisson. You do not have to worry about anybody else. Now it is said that in discussing that I talked about two people, Biles, and likewise I said you may also find them guilty, the implication being

> that I might have inferred to you that I have come to the conclusion that Hunsaker and Adkisson are guilty by that statement. If anybody got that idea, which I do not believe anybody did, but if they did I did not mean it that way. This is a good time to tell you again what I have told you many times, I am going to tell you what the law is; you tell me what the facts are, and you apply the facts to the law, and even if I should believe that one witness was not telling the truth or one of the defendants or both of them were guilty, you would be at liberty to disregard anything I said or any looks of mine because under the law you are the sole and exclusive judges of the facts and the credibility of all witnesses. I did not intend to tell you how I would decide this case because in past cases sometimes I tell you afterwards what I would have done, but I do not tell you before, and I did not intend to do it now.

Petitioner's counsel, still dissatisfied with the charge, reserved an exception and stated that the record would speak for itself (R. 32).

There was no error, even in the charge as originally given. It made no assumption as to petitioner's guilt, but, to the contrary, was explicit in requiring that his guilt or innocence be separately determined based on the evidence in the case. The admonition to disregard a possible finding as to guilt of the Biles, and to confine the inquiry to the guilt or innocence of the petitioner and his codefendant, was favorable, not harmful, to the petitioner. It precluded the jury from finding him guilty by mere association with the Biles if they thought that the Biles were guilty. But even if the original charge might have been construed as implying the court's belief in petitioner's guilt, this erroneous im-

plication was cured by the court's supplemental instructions. Cf. *Pennsylvania Co.* v. *Roy*, 102 U.S. 451, 458-459; *Turner* v. *American Security and Trust Co.*, 213 U.S. 257, 267. The supplemental charge unequivocally advised the jury that they should not draw any inference, from the previous remarks as to the Biles, that the court had come to the conclusion that petitioner and his co-defendant were guilty and that they should decide guilt or innocence for themselves. It must be presumed that the jury followed this clear and specific instruction. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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